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15 IN THE UNITED STATES DISTRICT COURT
16 FOR THE NORTHERN DISTRICT OF CALIFORNIA
17 SAN FRANCISCO DIVISION

18 UNITED STATES OF AMERICA,
19 Plaintiff,
20 v.
21 JOSE RODRIGUEZ,
22 Defendant.

23 Case No.: CR 19-279 CRB

24 **RESPONSE TO UNITED STATES'
25 SUPPLEMENTAL BRIEF REGARDING
26 DEFENDANT'S SUPPRESSION
27 MOTION**

28
29 Court: Courtroom 6, 17th Floor
30 Hearing Date: December 12, 2019
31 Hearing Time: 10:00 a.m.

INTRODUCTION

On October 16, 2019, the parties appeared before the Court for a hearing on Mr. Rodriguez’s motion to suppress. After ordering an evidentiary hearing, the Court requested supplemental briefing on the following questions: (1) whether the Ninth Circuit and the California Vehicle Code (“CVC”) permit custodial arrest of an individual stopped for a minor traffic offense—like the scooter infraction at issue in the present matter—who does not have identification on their person; (2) assuming such arrest is legally permissible, whether officers do in fact arrest people in those circumstances and what alternatives to arrest exist, in light of relevant policies and practices of the San Francisco Police Department (“SFPD”); (3) whether the officers in this case would have arrested Mr. Rodriguez based on a scooter infraction and failure to possess ID; and (4) how the officers eventually identified Mr. Rodriguez.

The government filed a supplemental brief on November 12, 2019. In its brief, the government argues that the Ninth Circuit, through its interpretation of California Penal Code (“CPC”) § 853.5, allows custodial arrest for an infraction when an individual does not have satisfactory identification. Officers Shaini and Murphy submitted supplemental declarations in support of the government’s argument that the officers would have arrested Mr. Rodriguez on that basis. Mr. Rodriguez agrees that the Ninth Circuit, CPC, and CVC permit custodial arrest for infractions in limited circumstances. However, documents from the SFPD indicate that the department’s policies governing citations and traffic enforcement would not have permitted Mr. Rodriguez’s custodial arrest for the scooter infraction, and that the overwhelming practice of the SFPD is to cite and release individuals for scooter infractions. Accordingly, the officers’ assertion that they would have arrested Mr. Rodriguez solely on the basis of a violation of CVC § 21235(g) because he did not have his driver’s license on him is simply not credible, as doing so would have been in direct contravention of the SFPD’s own policies and practices.

ARGUMENT

I. The Ninth Circuit Has Interpreted California Law To Allow Custodial Arrest For Infractions Only Under Limited Circumstances

Generally, a violation of the CVC is considered an infraction unless the specific provision is designated as a misdemeanor or a felony. *See* CVC § 40000.1. The regulations governing motorized

1 scooters, CVC §§ 21220–21235, are not amongst the provisions designated as misdemeanors or
 2 felonies; therefore, violations of scooter regulations are infractions. *See* CVC 40000.15 *et seq.* (listing
 3 CVC provisions that are treated as misdemeanors or felonies).

4 The government correctly states that the Ninth Circuit has held that California law only permits
 5 the custodial arrest of an individual for an infraction under limited circumstances, as delineated in
 6 CPC § 853.5. *See* Dkt. No. 35 at 2; *Edgerly v. City & Cty. of San Francisco*, 713 F.3d 976, 981 (9th
 7 Cir. 2013). The pertinent portion of CPC § 853.5 provides as follows:

8 In all cases, except as specified in Sections 40302, 40303, 40305, and
 9 40305.5 of the Vehicle Code, in which a person is arrested for an
 10 infraction, a peace officer shall only require the arrestee to present his or
 11 her driver's license or other satisfactory evidence of his or her identity for
 12 examination and to sign a written promise to appear contained in a notice
 13 to appear. If the arrestee does not have a driver's license or other
 14 satisfactory evidence of identity in his or her possession, the officer may
 15 require the arrestee to place a right thumbprint, or a left thumbprint or
 fingerprint if the person has a missing or disfigured right thumb, on the
 notice to appear. Except for law enforcement purposes relating to the
 identity of the arrestee, no person or entity may sell, give away, allow the
 distribution of, include in a database, or create a database with, this print.
 Only if the arrestee refuses to sign a written promise, has no satisfactory
 identification, or refuses to provide a thumbprint or fingerprint may the
 arrestee be taken into custody.

16 CPC § 853.5(a).¹ Notably, the statutory language explicitly establishes that a person stopped
 17 for an infraction is not legally required to possess an ID at that moment in order to avoid custodial
 18 arrest; officers may instead require the person to place a thumbprint on the notice to appear to
 19 complete the citation process. *Id.* The final sentence of CPC § 853.5(a) describes the only three
 20 situations in which an officer is allowed to make a custodial arrest for an infraction: (1) when the
 21 person refuses to sign a written promise to appear; (2) when the person has no satisfactory
 22 identification; or (3) when the person refuses to provide a fingerprint. *Id.* As will be discussed below,
 23 the SFPD further restricts its officers' authority to make custodial arrests for infractions to an even
 24 narrower set of circumstances than those described in CPC § 853.5.

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 26
 27
 28 ¹ CVC §§ 40302, 40303, 40305, and 40305.5 describes additional situations in which a custodial
 arrest for a CVC violation is permissible and/or mandated. The government presumably recognizes
 that none of these situations applies to Mr. Rodriguez's stop and thus has not asserted that they do.

1 **II. The Court Should Not Credit The Officers' Self-Serving Assertion That They Would**
 2 **Have Arrested Mr. Rodriguez For the Scooter Infraction**

3 The government contends that Officers Shaini and Murphy would have arrested Mr. Rodriguez
 4 based solely on a CVC infraction of riding a motorized scooter on a sidewalk in violation of 21235(g)
 5 and the fact that he did not have ID on his person. Dkt. No. 35 at 5; Declaration of SFPD Officer
 6 James T. Shaini in Support of United States' Supplemental Suppression Brief ("Shaini Suppl.
 7 Decl."), Dkt. No. 35-1, ¶ 6. However, such an arrest would have been in contravention of established
 8 SFPD policies and practices. Moreover, the officers did not pursue alternative available means to
 9 identify Mr. Rodriguez nor did they follow identification procedures that they themselves describe in
 10 their declarations.

11 **A. SFPD policies generally do not permit custodial arrests based solely on traffic**
 12 **infractions**

13 The SFPD, in conjunction with the Police Commission, has established a series of Department
 14 General Orders ("DGOs") that together constitute "the Department's most authoritative and
 15 permanent directives . . ." General Orders, SFPD, <https://www.sanfranciscopolice.org/your-sfpd/policies/general-orders>. DGOs set policies for all aspects of the SFPD, from rules of conduct to
 16 enforcement practices/procedures to uniform requirements.

17 DGO 5.06 (Citation Release) "mandates the policies for issuing citations to persons arrested for
 18 misdemeanor and infraction violations, establishes procedures for citing at the scene, and specifies
 19 when an incident report is required." Declaration of Robert Ultan in Support of Defendant's
 20 Response to United States' Supplemental Brief ("Ultan Decl."), Ex. D at 1. According to DGO 5.06,
 21 the general policy of the SFPD mandates that officers should "cite and release all persons arrested for
 22 misdemeanor and infraction offenses" rather than initiate a custodial arrest unless an exception
 23 applies. *Id.* When a person is stopped by the SFPD solely for an infraction, "he/she **shall** be cited"
 24 unless the person: (1) "refuses to present satisfactory evidence of his/her identity"; (2) "refuses to
 25 give a written promise to appear"; or (3) "demands an immediate appearance before a magistrate." *Id.*
 26 at 3 (emphasis added).

27 Under the "Procedures" heading, DGO 5.06 refers to DGO 9.01 (Traffic Enforcement) for
 28 further information regarding how officers should handle citations for traffic offenses. *Id.* DGO 9.01,

1 in turn, explicitly directs that “[e]xcept as required by Section 40302 CVC, all traffic violators **shall**
 2 **be released upon their written promise to appear.**” Ultan Decl., Ex. E at 2 (emphasis added).²
 3 With regard to the question of identifying a person to cite him/her for a moving violation, DGO 9.01
 4 states that, “[A]n officer shall reasonably ascertain the true identity of the violator. If this is not
 5 possible through valid identification **or other efforts**, the violator shall be booked” *Id.*
 6 (emphasis added). In its simplest form, these “other efforts” could consist of asking the person for
 7 their name and birthdate in order to run a records check. *See People v. Lopez*, 2019 Cal. LEXIS 8892,
 8 at *28-*30, *36-*37 (Cal. Supr. Ct. 2019) (holding that a warrantless search of a car during a traffic
 9 stop for evidence of identification violates the Fourth Amendment, and noting that the officer could
 10 have used less invasive methods to identify the driver, such as asking for identifying information)³;
 11 *see also* Shaini Suppl. Decl. ¶ 1; Declaration of SFPD Officer John F. Murphy in Support of United
 12 States’ Supplemental Suppression Brief (“Murphy Suppl. Decl.”), Dkt. No. 35-2, ¶ 2. Incident reports
 13 from other cases involving scooter infraction charges indicate that SFPD officers are able to and do in
 14 fact verify identification by following this procedure before making an arrest. *See* Ultan Decl., Ex. F.

15 The provisions of DGOs 5.06 and 9.01 make clear that when SFPD officers stop an individual
 16 for an infraction, they are supposed to issue a citation rather than arrest the person unless an
 17 exception applies. None of those exceptions are present in the instant case. They are also supposed to
 18 engage in other efforts to ascertain a traffic violator’s identity if the person does not have ID. Neither
 19 officer did so here.

20
 21 ² CVC § 40302 lays out four scenarios in which the default cite-and-release procedure does not apply,
 22 and the person must be arrested: (1) when the person does not present both a driver’s license or other
 23 satisfactory evidence of identity and an unobstructed view of his/her full face; (2) when the person
 24 refuses to give a written promise to appear; (3) when the person demands to be taken immediately
 25 before a magistrate; and (4) when the person is charged with violating CVC § 23152 (driving under
 26 the influence of alcohol or drugs). CVC § 40302. As previously noted, the government presumably
 27 recognizes that these exceptions do not apply to Mr. Rodriguez’s case and has not asserted that any
 28 do.

29 Officers may also choose to release a detainee without a citation and instead with a mere warning,
 30 *see Lopez*, 2019 Cal. LEXIS 8892, at *33-*34, which would vitiate the need for identification. The
 31 Court in *Lopez* clearly views custodial arrest for a traffic violation as the last resort if all else fails. *Id.*
 32 (“And finally, if no other path seems prudent or permissible, the officer can arrest the detainee and
 33 take him or her to be booked into jail for the traffic violation.”). It reasoned that “the availability of so
 34 many alternative means for achieving law enforcement ends tends to undermine the notion that the
 35 intrusion is reasonable” under the Fourth Amendment. *Id.* at *34.

1 Mr. Rodriguez never refused to give a written promise to appear, nor did he ever demand an
 2 immediate appearance before a magistrate. Mr. Rodriguez did not “refuse” to present evidence of his
 3 identity, and the officers did not make any other efforts to reasonably ascertain his identity—as DGO
 4 9.01 commands them to do—beyond asking for an ID. Mr. Rodriguez told Officer Shaini that his ID
 5 was in his car and pointed up the street in that direction; he never had the opportunity to provide other
 6 evidence of identity (i.e., his name and birthdate) because neither officer ever asked him for that
 7 information until well after Officer Shaini unlawfully frisked him. *See Declaration of Angela Chuang*
 8 in Support of Motion to Suppress (“Chuang Decl.”), Dkt. No. 16, Ex. A at 1121; Chuang Decl., Ex.
 9 B1 at 07:25:11–07:25:50.

10 Both officers state in their supplemental declarations that their practice is to ask a person for a
 11 name and birthdate if the person has no ID, which allows them to run a records check remotely. *See*
 12 Shaini Suppl. Decl. ¶ 1; Murphy Suppl. Decl. ¶ 2–3. Yet inexplicably, neither officer actually
 13 followed this self-reported practice by asking for Mr. Rodriguez’s name and birthdate after he said he
 14 had no ID.⁴ The officers also had other reasonable alternatives at their disposal—i.e., going with Mr.
 15 Rodriguez to his car to retrieve his ID, releasing Mr. Rodriguez with a verbal warning⁵—that they did
 16 not pursue. Nor did they pursue the option of having Mr. Rodriguez place his thumbprint on a notice
 17 to appear, which is explicitly contemplated by CPC § 853.5(a) as an alternative when an individual
 18 does not have ID. *See* CPC § 853.5. They therefore failed to follow their own department’s directives
 19 (DGOs 5.06 and 9.01); furthermore, had they arrested Mr. Rodriguez for a mere scooter infraction
 20 because he had no ID on his person, as they claim was their intent, that would have been in violation
 21 of those policies.

22 **B. SFPD’s overwhelming practice is to cite and release individuals for scooter**
 23 **infractions**

24 Actual SFPD practices regarding stops for scooter infractions further undermine the officers’
 25 assertion that they would have arrested Mr. Rodriguez on that basis. Between January 1, 2018, and

26 ⁴ Interestingly enough, Officer Murphy eventually identified Mr. Rodriguez by simply asking him for
 27 this information and requesting a records check **after** the unlawful frisk had already happened. *See*
 28 Murphy Suppl. Decl. ¶ 7.

5 Officer Murphy states in his declaration that issuing a verbal warning is within an officer’s
 discretion. Murphy Suppl. Decl. ¶ 4.

1 November 14, 2019, the SFPD issued 58 citations for scooter infractions. Ultan Decl. ¶ 5. During that
 2 same time period, the SFPD arrested 5 people for charges including scooter infractions, one of whom
 3 was Mr. Rodriguez. *Id.* ¶ 6. None of the custodial arrests was based solely on a scooter infraction,
 4 meaning they all involved additional criminal charges (misdemeanors or felonies) and/or active
 5 warrants. *Id.* This means that only 7.9% of these 63 encounters involving scooter infractions resulted
 6 in a custodial arrest, and 0.0% of them resulted in a custodial arrest based entirely on such
 7 infractions.⁶ Clearly, the overwhelming practice of the SFPD is to issue citations for scooter
 8 infractions, and it would have been incredibly anomalous—essentially unheard of—for Officers
 9 Shaini and Murphy to arrest Mr. Rodriguez just for violating CVC § 21235(g).

10 **CONCLUSION**

11 For the reasons set forth above and in previous filings, Mr. Rodriguez respectfully requests that
 12 the Court grant his motion to suppress in its entirety.

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 15 Dated: December 4, 2019

Respectfully submitted,

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⁶ It is important to note that SFPD was unable to provide documentation on the number of scooter
 infraction stops that resulted in a verbal warning and no citation, presumably because no such
 documentation exists. See Ultan Decl. ¶ 5. However, it is safe to assume that such encounters did
 occur within the same time period, which means that even the 7.9% figure overstates how often
 people are arrested on charges including scooter infractions.